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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 251

PANHANDLE EASTERN PIPE LINE COMPANY,
A CORPORATION,
Petitioner

vs.

FEDERAL POWER COMMISSION, ET AL.,
Respondents

BRIEF FOR RESPONDENTS, MICHIGAN-WISCONSIN PIPE LINE COMPANY, MICHIGAN PUBLIC SERVICE COMMISSION AND CITY OF DETROIT, IN OPPOSITION TO PETITION.

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Statutes Cited

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Opinions Below

The opinion of the Court of Appeals for the District of Columbia, delivered June 3, 1948 is not yet officially reported. It is printed as Appendix A to the Petition.

The opinions and orders of the Federal Power Commission are printed as Exhibits in Appendix C to the Petition.

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[1] All the other designated "Respondents" (except Federal Power Commission) supported Petitioner in the Court of Appeals. They will not, presumably, file any "brief in opposition" to the present Petition.

Jurisdiction

The judgment of the Court of Appeals (D. C.) was entered June 3, 1948 and the present Petition was filed August 30, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code and Section 19(b) of the Natural Gas Act.

Questions Presented

Whether there is any reason for granting a writ of certiorari to review the judgment of the Court of Appeals, which held that—

(1) There *was* substantial evidence to support the *specific findings* of the Federal Power Commission that Petitioner ("Panhandle") is unable to supply the full requirements of the Michigan market for natural gas and unable to supply *any* of the requirements of the Wisconsin market.

(2) The Federal Power Commission *lawfully granted* a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Co. to construct a pipe line into these markets after a *specific finding* "supported by substantial evidence" that this company is "able and willing properly to do the acts and to perform the service proposed."

(3) The Federal Power Commission did *not* "cut the rights of Panhandle in the Detroit and Ann Arbor markets to a volume below that which it is delivering under valid certificates."

(4) There is "no adequate basis for Panhandle's criticism of the procedure that was followed or its charge of bias against certain members of the Commission."

Statement

The Petitioner is seeking to obtain a review by this Court of the opinions, findings and orders of the Federal Power Commission and the opinion and judgment of the Court of

Appeals, which were based on consideration of a record of 26,000 pages of transcript including 560 voluminous exhibits (see Pet., p. 46). Petitioner's "Statement" is naturally inadequate and misleading; but probably no partisan would be able to produce in a few pages a really fair and adequate summation of such a long record of bitter controversy. To avoid making a similar failure we will not attempt a "restatement" but will refer to the clear and concise summary of the facts and issues presented in the short opinion of the Court of Appeals.

We believe that this Court can properly dispense with printing the record, because no substantial issue of law emerges even from the hodgepodge of facts which make up Petitioner's "Statement"; and no "reasons for granting the writ" appear except the obvious desire of Petitioner to induce this Court to reconsider the *evidence*, which the Commission and the Court of Appeals considered, and then undertake to reverse the findings of the Commission. But even a cursory inspection of the 26,000 page-record will show that these findings were based on "substantial evidence," as held by the Court of Appeals, and under the statute these findings of fact are therefore "conclusive" (Natural Gas Act, Sec. 19(b)).

A brief review of Petitioner's "Reasons for Granting the Writ" should be sufficient to demonstrate that they provide *no* reasons.

Argument

1

(Replying to Petitioner's First "Reason")

What question of "general importance" relating to construction of the Natural Gas Act has been decided by the Court of Appeals?

Petitioner contends that, as a "rule of law," a certificate should not be issued to permit a competitive service of

natural gas unless the existing service is inadequate *and* the existing supplier is given an opportunity to furnish additional service.

But, in the first place, there is no such "rule of law"; and not a case is cited which establishes such a "rule."

In the second place, the Natural Gas Act specifically negatives such a "rule" by providing that—"Nothing contained in this section shall be construed as a limitation on the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company" (Sec. 7(g)).

In the third place, the existing service of Panhandle was found by the Commission to be clearly inadequate for the Michigan markets and Panhandle had not even sought an opportunity to meet those demands before the Michigan-Wisconsin project was authorized.

> "It [Panhandle] has not applied for sufficient facilities nor demonstrated its ability to serve adequately the needs of these markets [Michigan markets] in addition to the expanding requirements of those which it enjoys in other areas which it supplies in Indiana, Illinois and Missouri" (F.P.C. Order of November 30, 1946 (Pet. App. C, p. 86)).
>
> "All parties to such proceedings, including Panhandle, readily acknowledged the fact that the demands on the latter's system greatly exceed the sales capacity of existing facilities" (Opinion of F.P.C. supporting Order of Nov. 30, 1946. See Pet. App. C, p. 147).

In the fourth place, Panhandle has no facilities at all and has sought no opportunity to serve the needs of gas consumers in Wisconsin (see Order of F.P.C. Nov. 30, 1946; Pet. App. C, p. 85).

Thus it is apparent that (1) there is no "rule of law" establishing the right of an existing natural gas pipe line

to a perpetual monopoly; and (2) if there were such a "rule of law" it would not be applicable to the present case. So there are no questions of "general importance" decided in this case "which have not been, but should be, settled by this Court."

The effort of Petitioner to contend that the Commission "cut its rights" to supply natural gas service in the Detroit-Ann Arbor area is based on two fallacies:

First, is the contention that Panhandle has "rights" to maintain a monopoly despite its inability to furnish adequate public service. That contention has no basis in law or fact, as shown above.

Second, is the contention that, in the Commission's avowed desire to protect Panhandle in its existing markets, it "cut its rights." The fact is that, in its order issued March 12, 1947 (Pet. App. C, p. 200), the Commission established *minimum* rights of Panhandle to continue deliveries of gas to Michigan Consolidated of "not less than" its annual volumes in the years 1942 or 1945 or the average of annual deliveries in the years 1942-1946—*and* "the right to participate in the future growth of the Detroit and Ann Arbor markets"—*and* reserved for Panhandle the right to apply for a modification of this order—*which Panhandle has never done.*

Thus, as the Court of Appeals held, the Commission established Panhandle's *minimum* rights, *not maximum* rights, and left available an administrative remedy for any injustice, which Panhandle has never utilized (see Court of Appeals Opinion (Pet. Appendix A, p. 55)). In the light of this record, Petitioner's claim of an unconstitutional deprivation of property becomes ludicrous.

2

(Replying to Petitioner's Second "Reason")

Where has the Court of Appeals "not given proper effect to the decisions of this Court"?

It is evident from Petitioner's meager argument and citations in support of this "reason" for granting a writ (Pet. Brief, pp. 38-39) that this contention is only (1) a renewal of its contention that the Commission "cut its rights" (which we have answered) and (2) a veiled contention that the Federal Power Commission should have made a number of findings in addition to its specific finding (which Petitioner *omits* to quote) which was that—

> "Applicant has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project after all necessary approvals and consents shall have been secured. It has not yet obtained, however, all the necessary approvals of operation from the State of Wisconsin and the communities to be served therein or of its proposed financing from the Securities and Exchange Commission. The authorization herein granted should be expressly conditioned upon the obtaining of all such necessary consents and approvals without which the project can be neither financed, constructed, nor operated" (Order of F.P.C. Nov. 30, 1946 (Pet. App. C, p. 86)).

As the Court of Appeals succinctly said:

> "This was both practical and legal. Congress has not confronted the two Commissions with a dilemma like that created by the famous municipal ordinance requiring that when two trains approach a grade crossing at the same time, both shall stop and neither shall proceed until the other has proceeded" (Pet. App. A, p. 53).

It should be observed in passing that the "consents and approvals" required by the Commission have since been obtained from Wisconsin and (as to financing) from the Securities and Exchange Commission—so Petitioner's complaints are a strangely unrealistic "reason" for the grant of a writ of certiorari.

It is equally pointless for Petitioner to argue that the Commission should have fixed rates some years in advance of complete construction and operation of a pipe line. As the Court of Appeals held:

> "The Act does not require, and because of changing costs it would be illusory to require, that rates be fixed before construction begins" (see Pet. App. A, p. 54).

3

(Replying to Petitioner's Third "Reason")

Where did the Court of Appeals depart so far from accepted judicial proceedings as to require the exercise of this Court's power of supervision?

Petitioner here complains *not* of the Court of Appeals, but of the procedure of the Federal Power Commission. This complaint comes with peculiarly bad grace from Petitioner, Panhandle, since the conferences with Federal Power Commissioners to which Petitioner refers (Brief, p. 39) were actually "initiated" *not* by the Commissioners but by a letter from Panhandle's Chairman for the purpose of having the Commission rule informally on an extraneous dispute between Panhandle and Michigan Consolidated over their contract for natural gas supply (Tr. 14702-5). By agreement this dispute was submitted to the Commission's informal arbitration and eventually was decided *in favor of Panhandle*. In the course of these conferences, efforts were made by both representatives of Panhandle and Michigan-Wisconsin to arrive at a composition of some of their differ-

ences in the pending pipe line proceeding. As the Commissioners later reported in the record, *they* avoided any commitments or partisanship but encouraged the parties in their efforts to simplify the issues (see Commissioners' formal statement, Tr. 14853-58). The full record of these matters was reviewed by the Court of Appeals which held:

> "We find no adequate basis for Panhandle's criticism of the procedure that was followed or its charge of bias against certain members of the Commission" (see Pet. App. A, p. 55).

It is certainly no departure from the accepted course of judicial proceedings for a reviewing court to hold, upon examination of the record, that charges of bias against an inferior tribunal by a defeated litigant are without basis.

It is also worthy of note that a Commission which had followed so closely extensive hearings before a trial examiner could properly expedite the conclusion of the case when it became evident that expedition was essential to a just and fair administration of the law. On final hearing extensive written and oral arguments were presented and the findings, opinions and orders of the Commission (Pet. App. C) provide ample evidence that the Commissioners were well informed and gave thorough consideration to all the issues and to the "substantial evidence" which the Court of Appeals held "supported" the Commission's findings and conclusions.

It is, finally, quite significant that, on the same day when the Michigan-Wisconsin certificate was granted, this "biased" Commission granted also a certificate to Panhandle to construct *all the additional facilities for which Panhandle had applied* (Pet. App. C, p. 189).

Conclusion

It is submitted that no tangible reasons for granting a writ of certiorari have been presented and that the Petition for a writ should therefore be denied.

Respectfully submitted,

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